# **United States Circuit Court of Appeals**

FOR THE NINTH CIRCUIT.

HERBERT STRAIN,

Appellant,

VS.

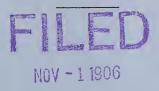
H. B. PALMER, Receiver,
BENJAMIN GRAHAM, Trustee,

THE AMERICAN FREEHOLD LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED, H. H. NELSON SHEEP COMPANY, H. H. NELSON AND JAMES T. STANFORD,

Appellees.

## Transcript of Record.

Upon Appeal from the United States Circuit Court for the District of Montana.





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COMPANY OF LONDON, ENGLAND, LIMITED,
H. H. NELSON SHEEP COMPANY, H. H. NELSON
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#### INDEX.

P	age
Assignment of Errors	79
Bill of Complaint	6
Bond on Appeal	
Bond Order Allowing Appeal and Fixing	
Amount of	78
Certificate, Clerk's, to Transcript	90
Citation	87
Clerk's Certificate to Transcript	90
Complaint, Bill of	6
Consent to Appointment of Receiver	36
Decree	39
Exhibit "A" (Trust Deed from H. H. Nelson	
Sheep Company to Benjamin Graham and	
The American Freehold Land Mortgage	
Company of London, England, Limited)	17
Exhibit "B" (Master's Certificate of Sale)	57
Exhibit "C" (Receipt for \$39,014.48, from Oli-	
ver T. Crane to M. S. Gunn)	58
Objections of Herbert Strain to Receiver's Re-	
port	72
Order Allowing Appeal and Fixing Amount of	
Bond	78
Order Denying Petition Pro Interesse Suo	66
Order Amending Order of May 28, 1906, etc	75

ii Index.

In the Circuit Court of the United States, Ninth Circuit, for the District of Montana, Sitting in Equity.

No. 705.

BENJ. GRAHAM, Trustee, et al.,

Complainants,

VS.

H. H. NELSON SHEEP COMPANY, et al.,
Defendants,

H. B. PALMER, Receiver,

Appellees,

HERBERT STRAIN, Petitioner pro interesse suo,
Appellant.

# Order Enlarging Time to File Record on Appeal to September 28, 1906.

Upon good cause shown, it is ordered that the time within which the above named appellant may docket the cause above-entitled and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and is hereby, enlarged and extended by the Judge who signed the citation on the appeal, to and including the 28th day of September, 1906.

Made this 20th day of August, 1906, and before the expiration of the 30 days, ending on September 7, 1906 from and after the signing of the citation on said appeal.

CHAS. E. WOLVERTON,

Judge.

[Endorsed]: No. 705. In the Circuit Court of the United States, Ninth Circuit, for the District of Montana. Benj. Graham, Trustee, et al., Complainants, vs. H. H. Nelson Sheep Co. et al., Defendants. H. H. Palmer, Receiver, Appellees. Herbert Strain. Petitioner pro interesse suo, Appellant. Order Enlarging Appellant's Time to File Record on Appeal, to September 28, 1906. No. 1371. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 5, 1906. F. D. Monckton, Clerk. Refiled Sep. 7, 1906. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HERBERT STRAIN, Petitioner pro Interesse suo,
Appellant,

VS.

H. B. PALMER, Receiver, BENJAMIN GRAHAM, THE AMERICAN FREEHOLD
LAND MORTGAGE COMPANY OF LONDON, ENGLAND, LIMITED (a Corporation), H. H. NELSON SHEEP COMPANY
(a Corporation), H. H. NELSON, and
JAMES T. STANFORD,

Appellees.

#### Stipulation and Praecipe.

It is hereby stipulated that the following designated parts of the record in the cause above entitled on appeal from the Circuit Court of the United States for the District of Montana are the only parts of said record which are necessary to the hearing in said Circuit Court of Appeals, and that such parts only be printed by the Clerk of the Court last named, to wit:

- 1. Bill of complaint, beginning on page 1 of the original certified record, omitting the affidavit of M. S. Gunn and inserting in lieu thereof "(duly verified)."
  - 2. Subpoena, page 20.
- 3. Order to show cause, page 22, dated April 14, 1904.
- 4. Consent to appointment of receiver, page 24, filed September 3, 1904.
- 5. Order appointing receiver, page 25, filed September 3, 1904.
- 6. Decree of foreclosure, page 28, entered February 4, 1905, omitting therefrom the description of the real estate ordered to be sold, and inserting in lieu of such description, "(Description of lands as in Bill of Complaint, omitted under stipulation of parties)."
- 7. Petition of Herbert Strain pro interesse suo, page 38.

- 8. Order requiring receiver to answer petition pro interesse suo, page 44.
- 9. Report of Sale by Master in Chancery, page 45, filed April 4, 1905, omitting the affidavit of publication, and inserting in lieu thereof "(Affidavit of publication of notice of sale, omitted under stipulation)."
- 10. Certificate of Sale, page 54, filed April 1 1905, omitting description of lands sold, and inserting in lieu thereof "(Description of lands as in Complaint and Decree omitted under stipulation)."
- 11. Receipt, Exhibit "C," page 58, filed and entered April 4, 1905.
- 12. Agreed statement of facts, page 60, filed June12, 1905.
- 13. Order denying petition pro interesse suc page 66, filed February 26, 1906.
- 14. Report of H. B. Palmer, receiver, page 67 filed April 21, 1906, omitting verification by Palmer
- 15. Objections of Strain, petitioner pro interess suo, to receiver's report, page 72, filed May 5, 1906.
- 16. Order, entered May 28, 1906, overruling objections to and approving receiver's account, pag 74.
- 17. Order amending order of May 28, 1906 mad May 31, 1906, and filed and entered nune pro tune a of May 28, 1906, page 76.
- 18. Petition for allowance of appeal and orde granting same and fixing bond, page 78.

- 19. Assignment of errors and prayer for reversal, page 81.
  - 20. Bond on appeal, page 87.
  - 21. Citation on appeal, page 90.
  - 22. Certificate of clerk, page 93.

In printing the Clerk will omit the order withdrawing the answer of defendant James T. Stanford, filed January 23, 1905; and all papers except those hereinbefore enumerated; and also omit title of court and cause after Bill of Complaint, and insert in lieu thereof: "(Title of Court and Cause)."

It is further stipulated that the said cause shall be heard upon the assignment of terrors accompanying said petition for an appeal.

A. C. GORMLEY and W. T. PIGOTT,

Solicitors and Counsel for the Appellant.

M. S. GUNN,

Solicitor and Counsel for Appellees.

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

Sir: You will please print the record in the cause above entitled pursuant to the foregoing stipulation.

A. C. GORMLEY, W. H. PIGOTT,

Solicitors and Counsel for Appellant.

[Endorsed]: No. 1371. In the United States Circuit Court of Appeals, for the Ninth Circuit. Herbert Strain, Petitioner Pro Interesse Suo, Appellant, vs. H. B. Palmer, Receiver, et al., Appellees. Stipulation and Praecipe. Filed Sep. 7, 1906. F. D. Monckton, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

#### IN EQUITY.

BENJAMIN GRAHAM, and the AMERICAN FREEHOLD LAND MORTGAGE COM-PANY OF LONDON, ENGLAND, LIM-ITED (a Corporation),

Complainants,

VS.

H. H. NELSON SHEEP COMPANY (a Corporation), H. H. NELSON and JAMES T. STANFORD,

Defendants.

#### Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the District of Montana: Benjamin Graham, a citizen of the State of New York, and The American Freehold Land Mortgage Company of London, England, Limited, a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, bring this their bill of complaint against the

- H. H. Nelson Sheep Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, and H. H. Nelson and James T. Stanford, each of whom are citizens of the State of Montana, and thereupon your orators complain and say:
- 1. That your orator, Benjamin Graham, is now and was at all times herein mentioned a resident and citizen of the State of New York, and your orator, The American Freehold Land Mortgage Company of London, England, Limited, is now and was at all of said times a corporation organized and existing under and pursuant to the laws of the Kingdom of Great Britain and Ireland.
- 2. That the defendant, H. H. Nelson Sheep Company, is now, and was at all the times herein mentioned, a corporation organized and existing under and by virtue of the laws of the State of Montana, and the defendants, H. H. Nelson and James T. Stanford, and each of them, are now and were at all of said times residents and citizens of said State.
- 3. That the amount in controversy in this suit exceeds the sum of two thousand dollars, exclusive of interest and costs.
- 4. That on the 20th day of March, 1901, the defendant, H. H. Nelson Sheep Company, made, executed and delivered to your orator, The American Freehold Land Mortgage Company of London, Eng-

land, Limited, its two certain promissory notes or bonds, with coupon or interest notes attached thereto, each of which principal promissory notes or bonds is for the sum of fifteen thousand dollars, and is in the words and figures following:

\$15,000. No. 132.

# UNITED STATES OF AMERICA. FIRST MORTGAGE BOND.

Helena, Montana, March 20th, 1901.

On the twentieth day of March, A. D. 1906, for value received, the maker or makers of this bond promise to pay The American Freehold Land Mortgage Company of London, England, Limited, or order, fifteen thousand dollars (\$15,000.00), payable in lawfully coined gold money of the United States of America, with interest thereon payable in like money, at the rate of seven per centum per annum, interest payable semi-annually; according to the tenor and effect hereof, and of ten interest or coupon notes hereto attached Both principal and interest notes are negotiable and are payable at the office of H. B. Palmer & Company, in the city of Helena, Montana, with current exchange on New York, and without and relief whatever from valuation or exemption laws.

It is agreed, that if any part of the principal or interest is not paid at maturity it shall bear interest after maturity at the rate of ten per centum per annum, payable in like manner as hereinbefore expressed; and if any part of the interest is not paid when it becomes due it shall be calculated and paid at the rate of ten per centum per annum, instead of at seven per centum per annum as set forth in the interest coupons attached; and if any part of the interest remains unpaid for 30 days after it becomes due, it shall cause the principal to become due and collectible at once, without notice, at the payee's option, and the mortgage or deed of trust securing this bond may be enforced in accordance with the terms thereof, together with 4 per cent attorney's fees to be taxed as costs in the event of a suit being instituted for the collection of this bond or any interest thereon.

The maker or makers of this bond reserve the right to make partial payments on the principal thereof at any regular interest period as herein set forth after April 1st, 1902, in sums of not less than \$1,500, and on payments so made the interest shall cease from date of such payments, and the interest coupons shall be reduced in pro rata proportion; and all payments so made are payable at the same place and in the same manner, where this bond is payable as hereinbefore set forth; and provided that not less than thirty days' notice in writing, shall be given to the payee by the maker or makers of this bond of the intention to make such payment. The principal and interest of this bond are secured by a mortgage or deed of trust, which is a first lien on real estate

situated in Cascade County, Montana, and duly authorized by a resolution of the stockholders of the corporation issuing the same at a meeting regularly called and held on the twelfth day of March, 1901.

H. H. NELSON SHEEP COMPANY,

[Corporate Seal]

By H. H. NELSON,

President.

Attest: ANNA A. NELSON,

Secretary.

(The instrument given to secure this obligation has been duly stamped as required by law.)

- 5. That at the time of the execution and delivery of said promissory notes or bonds the defendant H. H. Nelson guaranteed the payment of the principal and interest of each thereof, which said guaranty is evidenced by an indorsement in writing upon each of said promissory notes or bonds, signed by the said H. H. Nelson.
- 6. That on the said 20th day of March, 1901, the said defendant H. H. Nelson Sheep Company made, executed and delivered to your orator Benjamin Graham, as trustee, its mortgage or trust deed, wherein and whereby it granted, bargained, sold and conveyed to your orator as trustee certain property described therein, as security for the payment of said principal sum and interest mentioned in said promissory notes or bonds as the same should respectively become due and payable, and also as security for the

performance of the covenants in said mortgage or trust deed contained.

- 7. That said mortgage or trust deed was duly asknowledged and certified so as to entitle it to be recorded, and the same was afterwards and on the 28th day of March, 1901, duly recorded in the office of the county clerk and recorder of Cascade County, Montana, in book 18 of Mortgages, page 249; a copy of which said mortgage or trust deed, with the indorsements thereon, is hereunto annexed, marked Exhibit "A," and prayed to be taken and considered as a part of this bill of complaint the same as though set forth herein in haec verba.
- 8. That the interest on said principal sum mentioned in said promissory notes or bonds and in the said mortgage or trust deed has been paid down to the first day of October, 1902, but no part of the principal sum has been paid; that your orators, pursuant to the option and privilege granted and conferred by said promissory notes or bonds and said mortgage or trust deed so to do, have declared and hereby declare the entire principal, to wit, the sum of thirty thousand dollars (\$30,000.00), due and payable.
- 9. That the said defendant, H. H. Nelson Sheep Company, has failed to keep the buildings on said property or premises insured as by the said trust deed or mortgage it covenanted or promised to do, in consequence whereof your orator, Benjamin Graham, trustee, has caused the said buildings to be

insured, and has paid therefor the premium of \$70.25.

- 10. That your orator, The American Freehold Land Mortgage Company of London, England, Limited, is the lawful holder and owner of said promissory notes or bonds and said interest or coupon notes attached thereto.
- 11. That the defendant, James T. Stanford, as agent for the stockholders of the Northwestern National Bank of Great Falls, Montana, has or claims to have some interest or claim upon said premises and property described in said trust deed or mortgage, or some part thereof, as mortgagee or otherwise, which interest, if any, has accrued subsequent to the execution, delivery and recording of said trust deed or mortgage, and is subject, subservient and subsequent to the lien created thereby.
- 12. Your orators further show that the real estate and property described in said trust deed is insufficient as security for the payment of the said principal sum and interest and the performance of the covenants to be kept and performed by the said H. H. Nelson Sheep Company as provided in said trust deed or mortgage, and that the said H. H. Nelson Sheep Company and the said H. H. Nelson are each and both insolvent.
- 13. Your orators further show that the said defendant, H. H. Nelson Sheep Company, is in posses-

sion of said premises and property described in said trust deed or mortgage, and has for more than one year last past collected and received the rents, issues, income and profits of said property, appropriated the same to its own use, and failed and refused to apply any part thereof to the payment of either the principal or interest secured by said trust deed or mortgage, or the payment of the premium for the insurance of the building thereon, and that unless a receiver is appointed as prayed for in the prayer hereto the said H. H. Nelson Sheep Company will continue to collect and receive the rents, issues, income and profits of said property, and appropriate the same to its own use as it has been doing.

- 14. That a solicitor's fee in this suit of four per cent of the amount due is reasonable and fair, and should be allowed and paid as in and by said promissory notes and bonds and said trust deed or mortgage provided.
- 15. That four per cent of the whole amount due and unpaid is a reasonable and fair compensation and commission to be allowed and paid your orator, Benjamin Graham, for his services as trustee, as in and by said mortgage or trust deed provided.

In consideration whereof, and inasmuch as your orators are remediless at and by the strict rules of the common law and are only relievable in a court of equity where matters of this and the like nature are cognizable and relievable, to the end that the said defendants hereafter named may and each of them may full, true, direct and perfect answer make to your orators bill of complaint (but without oath, the answer of the said defendants or either of them under oath being hereby expressly waived pursuant to the provisions of the general Equity Rules governing Circuit Courts of the United States), and as fully and particularly as if the same were again repeated, and they and each of them were thereunto particularly interrogated, your orators pray:

That the usual decree may be made for the sale of said mortgaged premises aforesaid according to law and the rules and practice of this Court; that the proceeds of such sale may be applied to the payment of the costs and expenses of this suit, and in other respects as provided in said trust deed or mortgage; that the said defendant, H. H. Nelson Sheep Company, and all persons claiming by, through or under it subsequent to the execution of said mortgage upon said premises, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all rights, claim or equity of redemption in and to said premises and every part thereof, and that your orators may have a judgment against said Sheep Company and H. H. Nelson for any deficiency remaining after the application of the proceeds as aforesaid.

And your orators further pray that a receiver be appointed according to the course and practive of this court with the usual powers of receivers in like

cases, of all the property described in said mortgage or trust deed, and the income, rents, issues and profits thereof, to hold and dispose of the same as by this Honorable Court may be ordered, and that said H. H. Nelson Sheep Company be decree to transfer and deliver possession of said property and the whole thereof to the receiver so appointed; and that your Honors will enjoin the said defendant H. H. Nelson Sheep Company, its solicitors, officers, agents and servants from in any manner disposing of any of the property subject to said mortgage, or any of the income, rents, issues or profits thereof, or from interfering with or in any manner hampering, delaying, or preventing such person as may be appointed receiver in the performance of the duties imposed upon him by said Court; and that your Honors will, until the hearing of the application for the appointment of such receiver, enjoin and restrain said defendant H. H. Nelson Sheep Company, its solicitors, officers, agents and servants, from in any manner disposing of any of the property subject to said mortgage or trust deed, or the income, rents, issues or profits thereof, or transferring the possession thereof, or any thereof; and that your orators may have such other and further relief as the nature of this case may require and as may be agreeable to equity and good conscience.

And may it further please this Honorable Court to grant unto your orators the most gracious writ of subpoena, in the name of the President of the United States, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants H. H. Nelson Sheep Company, H. H. Nelson and James T. Stanford, therein and therby commanding them and each of them by a certain day and under a certain penalty therein to be inserted, personally to be and appear before this Honorable Court, then and there to answer this, your orator's bill of complaint, and further to stand to, abide by and perform such order and decree as the Court may make in the premises, and as shall be agreeable to equity and good conscience.

And your orators will ever pray, etc.

MILTON S. GUNN,

Solicitor and of Counsel for the Complainants.
[Duly verified.]

Subscribed and sworn to before me this 11th day of April, A. D. 1904.

[Seal]

JNO. K. SCOTT,

Notary Public, Lewis and Clarke County, State of Montana.

#### Exhibit "A."

\$30,000. TRUST DEED.

No. 132

This indenture, made and entered into this 20th day of March A. D. 1901, by and between the H. H. Nelson Sheep Company, a corporation duly organized under the laws of the State of Montana, the party of the first part (and hereinafter for brevity

designated the grantor); and Benjamin Graham, Trustee, the party of the second part (and hereinafter for brevity designated the trustee), and The American Freehold Land Mortgage Company of London, England, Limited, the party of the third part, witnesseth:

That the party of the first part for and in consideration of thirty thousand dollars (\$30,000) in lawfully coined gold money of the United States of America, in hand paid, by the party of the third part, the receipt of which is hereby acknowledged, has granted, bargained, sold and conveyed, and does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, with full power of substitution, and to successors in trust and assigns, forever, the certain tract or parcel of land situate, lying and being in the county of Cascade and State of Montana, and particularly described as follows, to wit:

Lands in township nineteen (19) north, range one (1) east of the principal meridian Montana as follows:

The southeast quarter of the northeast quarter of section twenty-two (22) containing forty acres; also

The south half of section twenty-three (23), and the south half of the northeast quarter of said section twenty- three (23), and the south half of the northwest quarter of said section twenty-three (23) containing four hundred and eighty (480) acres in said section twenty-three (23); also

The southwest quarter, and the southwest quarter of the nortwest quarter of section twenty-four (24) containing two hundred (200) acres in said section twenty-four (24); also

The following lands in section twenty-five (25), to wit: The north half of the northeast quarter; the the southeast quarter of the northeast quarter, the north half of the northwest quarter, the south half of the northwest quarter, and lot number two; or a total area in said section twenty-five (25) of two hundred and sixty-three and sixty seven one hundredths (263.67) acres. Also

The following lands in section twenty-six (26), to wit: The northeast quarter, and the northeast quarter of the northwest quarter, and the east half of the southwest quarter, and the southeast quarter; or a total of four hundred and thirty-nine and ten one-hundredths (439.10) acres in said section twenty-six (26). Also

The east half of the southeast quarter of section thirty-two (32) containing eighty (80) acres; also The southwest quarter of section thirty-three (33) containing one hundred and sixty (160) acres; also

The northeast quarter of the southeast quarter and lot number one in section thirty-four (34) containing seventy-eight and sixty one-hundredths (78.60) acres; also

The northwest quarter and lots, numbers one and four in section thirty-five containing two hundred and twenty-three and fifty-eight one-hundredths (223.58) acres; and being a total acreage in said township nineteen of nineteen hundred and sixty-four and eighty-five hundredths (1964.85) acres more or less, according to the official survey of the United States; and also lots numbers two (2) and three (3) in section thirty-five (35), township nineteen (19) north, range one (1) east, containing seventy-five (75) acres, more or less.

Also the following lands in township eighteen (18) north, range one (1) east, to wit:

Lots numbered one (1), two (2), five (5) and six (6), in section three (3), containing ninety and sixty-seven one-hundredths (90.67) acres.

Also the following lands in section four (4): Lots numbered three (3), four (4), five (5), seven (7), and the north half of the southwest quarter, and the south half of the northwest quarter, and the southwest quarter of the northeast quarter; or a total acreage in said section four (4) of three hundred and fifty-nine and nine one-hundredths (359.09) acres.

Also lot number one (1) in section five (5), containing forty-three and twenty-one one-hundredths (43.21) acres.

Also lots numbered one (1), two, (2), three (3), and the north half of the northwest quarter of sec-

tion seventeen (17), containing one hundred and ninety-five and three one-hundredths (195.03) acres.

Also the east half of the northeast quarter, and lot number seven (7) of section eighteen (18), containing ninety-six and ninety-nine one-hundredths (96.99) acres; and being a total of seven hundred and eighty-four and ninety-nine one-hundredths (784.99) acres in said township eighteen north, range one (1) east.

Also the south half of the northeast quarter, and the north half of the southeast quarter of section twenty-six, in township four (4) north, range one (1) east, containing one hundred and sixty (160) acres.

Also the west half of the southwest quarter of section twenty-nine, and the southeast quarter of the northeast quarter, and the northeast quarter of the southeast quarter, of section thirty (30), all in township five (5) north, range one east, containing one hundred and sixty (160) acres.

Also the following lands in townsihp eighteen (18) north, range one (1) west, as follows:

The south half of the south half of section nine (9), containing one hundred and sixty (160) acres.

Also the south half of the southwest quarter of section thirteen (13), containing eighty (80) acres. Also the south half of section fifteen, and also the south half of the north half, and the northeast quarter of the northwest quarter, and the northwest quarter of the northwest quarter of said section fif-

teen (15), or a total acreage in said section fifteen of five hundred and sixty (560) acres;

Also all of section twenty-three (23), containing six hundred and forty (640) acres.

Also the south half of the southwest quarter, and the northwest quarter of the southwest quarter of section ten (10) containing one hundred and twenty (120) acres.

Also lots numbered two (2), three (3), and four (4), and the south half of the northeast quarter of section twenty-four (24), or a total acreage in said township eighteen north, range one (1) west of seventeen hundred and twenty-one and twenty-one one-hundredths (1722.21) acres, more or less, and all of said lands hereinbefore designated comprising a combined acreage of four thousand eight hundred and sixty-seven and five one-hundredths (4,867.05) acres, more or less, according to the official survey of the United States of America.

(Warranty.) Together with all and singular the tenements, improvements, hereditaments, appurtenances, easements, water rights and all other rights belonging or in anywise appertaining thereto, unto the said trustee, and successors in trust and assigns forever. The grantor represents to and covenants with the said trustee and successors in trust and assigns that it is well and truly seised and in possession of the foregoing described premises, and that the same is free and clear of all encumbrance except

this indenture which is the first and only lien at the time of the execution hereof, and will warrant and defend said premises against the lawful claims of all persons whomsoever.

(Obligation.) Provided always: That this conveyance is made in trust for fulfillment of, and securing and enforcing the obligations undertaken in these presents, and upon the following express conditions, to wit: That the said grantor shall pay or cause to be paid to the said party of the third part, successors and assigns, the sum of thirty thousand dollars (\$30,000), together with interest thereon from the twentieth day of March, A. D. 1901, said sum of money being represented by two principal notes, each for the sum of fifteen thousand dollars (\$15,000) maturing on the twentieth day of March, A. D. 1906, and ten interest or coupon notes thereto attached (to each of said principal notes), one for the sum of \$555.70 maturing October 1, 1901, and eight each for the sum of \$525 maturing on the first days of April and October of each succeeding year respectively, and one note for \$494.30 maturing March 20th, 1906; all of said notes negotiable and payable at the office of "H. B. Palmer & Company" in the city of Helena, Montana, and made by the grantor herein, to the said party of the third part; with exchange on New York and interest after maturity at the rate of ten per cent per annum, payable

annually, and according to the tenor and effect of said principal and interest or coupon notes.

(Agreement.) It is agreed that if the said grantor or maker of the obligation secured by this indenture fail to pay any or either of said principal, interest or coupon notes at maturity, (or for 30 days thereafter) or taxes, assessments or insurance, as hereinafter provided, or fail to comply with any of the conditions of this indenture, then all of said debt secured hereby shall, at the option of the trustee, successors or assigns, become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part, and the occupants of said property shall pay rent to the trustee, successors or assigns, or his or their agent, and the conditions of this indenture may be enforced for the full amount, together with costs, taxes, insurance, cost of abstract of title, and any other or all sums advanced or expenses incurred on account of the grantor and by reason of these presents for whatsoever purposes; and any advances paid shall draw interest at the rate of ten per cent per annum and be liens under this indenture. And upon such failure, default or violation aforesaid, the grantor herein does fully empower said trustee, original, substituted, successors or assigns, and it is hereby made his special duty at the request of the holder of the obligations

secured hereby, at any time made after default as aforesaid, to take such steps as may be necessary for the collection of said debt, principal and interest, and to collect and sue for any rents due, or to become due on said premises, and without process of law to enter upon and take possession of, or let said premises, and either before or after said entry, when the trustee, his successors or assigns, shall see fit, to sell the property herein conveyed, or any part thereof, together or in parcels, at public auction for cash, or on credit, at a place, time, and after the advertisement by him given, substantially conforming to and as required by law in the cases of sales on execution at the time of sale, and to execute and deliver to the purchaser or purchasers thereof, good and sufficient deed or deeds in fee simple for the same, which shall vest the complete and unencumbered title of said property, and be a bar against the grantor herein, its successors and assigns, and all persons claiming under it or any of them, of all right, interest or claim in and to said property, and all parts thereof, to receive the proceeds, the same to be applied in order as follows: First, to the proper expenses of advertising, selling and conveying as aforesaid, including the necessary traveling expenses of the trustee, and a commission to the trustee of four per cent, upon the whole amount due and unpaid; second, to the payment of taxes, insurance and other outlays paid under and by virtue of these presents, with interest;

third, to the payment of the sums due by virtue of said notes for principal and interest, together with any court costs; and lastly, the remainder of such proceeds to be held subject to the order of the grantor herein.

It is further agreed that if said proceeds be not sufficient to pay all the sums above designated in the order above set forth, that then any and all sums applicable upon the principal or interest represented by the said notes shall be by the trustee credited thereon, the grantor hereby agreeing to pay any residue remaining unpaid, and consenting that the holder of the said notes may proceed in law or in equity, at any time, for the collection of the same with interest, in accordance with the effect and tenor of the said notes thus remaining unpaid; and immediately upon said sale by the trustee, successors or assigns, to yield quiet possession to the purchaser of the premises and property so sold and conveyed, provided, earlier possession of the same be not taken by the trustee before the sale as hereinbefore provided, and that said party of the third part, its successors or assigns, may, at its or their option, be the purchaser or purchasers at said sale, or at the judicial sale of the same, as hereinafter provided for in case of foreclosure under decree of court.

It is further agreed that in case proceedings to enforce the conditions of this indenture and the payment of the said amounts under the power of sale on the part of the trustee, his successors or assigns, as herein conferred, be not at his or their option desirable, then and in that event, recourse may be had to an action in the courts for such enforcement, and that there shall be included in the judgment of foreclosure, in addition to the items hereinafter set forth or above designated, exclusive of the commissions of the trustees and the expenses incident to a sale by him, an attorney fee of four per cent on the amount of the principal recovered, which fee shall be a lien upon said property, and taxed and collected as other costs in said action; and that at the commencement of said suit, or at any time upon application of the plaintiff or plaintiffs therein, a receiver may be appointed by the Court pending said suit, and until the period of redemption expires, to care for said property, rent the same and collect such rentals and make disposition of said rents under the order of the Court. And the omission of the trustee. successors or assigns, to exercise his or their option in said matter or to proceed by reason of any default of the grantor in payment as aforesaid, at any time or times, shall not preclude said trustee, successors or assigns from the exercise thereof at any subsequent time or upon any subsequent default or defaults of the grantor in payment as aforesaid; and said trustee, successors or assigns, is not required to give any written or other notice whatsoever as to the exercise of said option, but may proceed at any

time or times to avail himself or themselves of the powers conferred, or to enforce the conditions of this indenture and to sell the property hereinbefore described by exercise of the power of sale herein conferred, or by recourse to the court.

It is further agreed, that should said trustee, successors in interest or assigns, become involved in litigation by reason hereof, or should the title of the grantor be called in question in any action or proceeding in any court, or before the land department of the United States, and the trustee, successors or assigns, should make expense by reason thereof, or incur expense in defending for the grantor, then all the costs and expenses incurred therein shall be paid by the grantor and the same may be recovered as part of the money secured hereby.

It is further agreed, that so much of the lands hereinbefore described, occupied as the right of way, and heretofore conveyed as right of way to the Montana Central Railroad Company, are exempt from the operations and lien of this indenture.

It is further agreed, that until said debt is fully paid, the grantor shall keep all required taxes and assessments against the said property fully paid, and shall keep an insurance in a reliable insurance company or companies to the amount of five thousand dollars on the buildings on the described premises, for the benefit of said trustee, successors and assigns, and deliver to him or them, or his or their

agent, said policy or policies of insurance and renewals thereof, to be held until said debt is fully paid, and it is hereby agreed that said insurance shall be in a company or companies designated by the said trustee, successors or assigns, or his or their agent, and in the event of their being any assessment or taxes levied or made against this indenture, or the debt or any part thereof secured thereby, the said grantor agrees to pay such taxes and assessments as part of the consideration hereof, and on default the trustee, successor or assigns, may pay such encumbrance, insurance, taxes or assessments, and collect the amount thereof with ten per cent interest, and in the event of any taxes or assessments becoming delinquent, and the said trustee, successors or assigns, purchasing said property at public sale, it is hereby fully agreed that said trustee, successors or assigns, shall be entitled to the full penalty authorized by the law to be added to the amount of said taxes or assessments so paid, which entire sum shall then become a part of this debt, and bear interest at the rate of ten per cent per annum from date of purchase.

It is further agreed, that the said grantor shall keep all buildings, fences, ditches and other improvements on said premises in as good repair and condition as they are at this date, and shall not remove any of said without the consent of said trustee, successors or assigns; and it is mutually agreed that the said trustee shall have power to appoint a substituted trustee, to carry out all or any part of these presents, which appointment may be evidenced either by a writing or in any other proper manner, and may withdraw such appointment and resume acting at his pleasure. And in case of the death, absence, inability or refusal of the trustee named herein to act, then H. B. Palmer of Helena, Montana, is designated and appointed and made successor in trust to the trustee hereinbefore named, with like power and authority.

Finally, the said grantor hereby expressly agrees to comply with and perform all the foregoing conditions, and upon compliance therewith these presents to be void, otherwise to remain in full force and effect, and that the reconveyance or release of the said property from the operation of this indenture is to be made at the expense of the said grantor on full payment of the indebtedness at maturity and after fully complying with the conditions of this indenture.

It is hereby certified and recited, that this indenture and the obligations secured hereby are duly authorized by and in pursuance to a resolution of the stockholders of the H. H. Nelson Sheep Company passed at a meeting regularly called and held on the twelfth day of March, A. D. 1901. Wherein the trustees were duly empowered and authorized to execute the same, and of a similar resolution of the

trustees passed at a meeting regularly called and held on the twelfth day of March, 1901. And wherein the President and Secretary of the company were duly authorized and empowered to execute this indenture for and in behalf of the company.

In witness whereof, the said H. H. Nelson Sheep Company of Montana has caused these presents to be duly executed by its President and attested by its Secretary and the corporate seal of the company to be hereto affixed at Riverdale Stock Farm, and office of the company in Cascade County, Montana, this —— day of March, A. D. 1901.

H. H. NELSON SHEEP COMPANY.

[Corporate Seal] By H. H. NELSON,

President.

Attest: ANNA A. NELSON,

(\$14.50—Internal Revenue Stamps duly canceled.)

#### ACKNOWLEDGMENT.

State of Montana, County of Cascade,—ss.

On this twenty-first day of March, A. D. 1901, before me, Ransom Cooper, a notary public in and for said county, personally appeared H. H. Nelson, known to me to be the president, and Anna A. Nelson, known to me to be the secretary respectively, of the corporation that executed the within instrument,

and who acknowledged to me that such corporation executed the same.

In testimony whereof I have hereunto subscribed my name and affixed my official seal the day and year in this certificate first above written.

[Notarial Seal] RANSOM COOPER,

Notary Public in and for Cascade County and State
of Montana.

My commission as notary public expires January 27th, 1903.

[Endorsed]: Office of County Clerk and Recorder, County of Cascade, Montana. I hereby certify that the within deed was filed for record in this office on the 28th day of March, 1901, at 5:05 o'clock P. M., and was duly recorded in Book 18 of Mtgs., page 249.

VINCENT FORTUNE,
County Clerk and Recorder.
By Manton Shepperd,
Deputy.

[Endorsed]: No. 705. In the Circuit Court of the United States, Ninth Circuit, District of Montana. Benjamin Graham et al., Complainants, vs. H. H. Nelson Sheep Co. et al., Defendants. Bill of Complaint. Filed and Entered Apr. 11, 1904, Geo. W. Sproule, Clerk. M. S. Gunn, Solicitor and of Counsel for Complainants.

And thereafter, to wit, on the 11th day of April, A. D. 1904, a subpoena in equity was duly issued herein, which is in the words and figures following, to wit:

### UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana.

### IN EQUITY.

Subpoena ad Respondendum.

The President of the United States of America, Greeting, to H. H. Nelson, Nelson Sheep Company, a Corporation, H. H. Nelson and James T. Stanford, Defendants.

You are hereby commanded, that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in Helena, on the 2d day of May, A. D. 1904, to answer a bill of complaint exhibited against you in said court by Benjamin Graham and the American Freehold Land Mortgage Company of London, England, Limited, a corporation, Complainants, who are citizens of the State of New York and the Kingdom of Great Britain and Ireland, respectively, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FUL-LER, Chief Justice of the United States, this 11th day of April, in the year of our Lord one thousand nine hundred and four and of our Independence the 128th.

[Seal]

GEO. W. SPROULE,

Clerk.

Deputy Clerk.

Memorandum Pursuant to Rule 12, Superior Court U. S.

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

[Seal]

GEO. W. SPROULE,

Clerk.

Ву ----

Deputy Clerk.

MILTON S. GUNN,

Solicitor for Complainants, Helena, Montana.

Service of within subpoena admitted and receipt of copy thereof acknowledged in Cascade County, Montana, this 28th day of April, 1904.

H. H. NELSON SHEEP CO.

By H. H. NELSON, Prest.

H. H. NELSON.

JAMES T. STANFORD, May 3, 1904.

[Endorsed]: No. 705. U. S. Circuit Court, Ninth Circuit, District of Montana. In Equity. Benjamin Graham et al. vs. H. H. Nelson Sheep Co. et al. Subpoena. Filed May 5, 1904. Geo. W. Spoule, Clerk.

And thereafter, to wit, on the 14th day of April, A. D. 1904, an order to show cause was issued herein, which said order to show cause is in the words and figures following, to wit:

[Title of Court and Cause.]

#### Order to Show Cause.

Upon application of the complainants in the aboveentitled suit, by their solicitor, M. S. Gunn:

It is ordered that the defendant, H. H. Nelson Sheep Company, its agents, officers and servants, and all other persons, be and they are hereby restrained and enjoined from selling, disposing of, or transferring the possession of any of the property described in the trust deed or mortgage made a part of the bill of complaint in this suit, and recorded in the office of the county clerk and recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the Court herein; and,

It is further ordered that the defendants herein show cause before the above-entitled court in Helena, Montana, where said court is held, on the 17th day of May, 1904, at the hour of ten o'clock A. M., or as soon thereafter as a hearing can be had, why a receiver of the property described in the said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for in the bill of complaint in this suit.

Dated this 14th day of April, A. D. 1904.

HIRAM KNOWLES,

Judge.

Service of the foregoing order accepted and receipt of copy thereof and a copy of the bill of complaint and affidavit of H. B. Palmer are acknowledged this 16th day of April, 1904.

H. H. NELSON SHEEP CO.,
By H. H. NELSON, Prest.
H. H. NELSON.

JAMES T. STANFORD.

[Endorsed]: Title of Court and Cause. Order to Show Cause and Restraining Order. Entered April 14, 1904. Filed May 5, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of September, A. D. 1904, defendants filed their consent to the appointment of a receiver herein, which said consent to appointment of receiver is entered of final record as follows, to wit: [Title of Court and Cause.]

# Consent to Appointment of Receiver.

The defendant, H. H. Nelson Sheep Company, being in the possession of the property described in the trust deed or mortgage made a part of the bill of complaint in the above-entitled suit, hereby consents to the granting of the prayer of said bill of complaint for the appointment of a receiver to take possession of, manage, operate and hold said property during the pendency of this suit, and to receive and collect the rents, issues and profits thereof and hold and dispose of the same subject to the order of said court; and hereby waives notice of the application for such appointment.

Dated this 18th day of April, A. D. 1904.

H. H. NELSON SHEEP COMPANY,

By H. H. NELSON, President.

H. H. NELSON.

[Endorsed]: Title of Court and Cause. Consent to Appointment of Receiver. Filed Sept. 3, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 3d day of September, A. D. 1904, an order appointing receiver was entered herein, which said order is entered of final record as follows, to wit: [Title of Court and Cause.]

# Order Appointing Receiver.

Now, on the 3d day of September, 1904, come the complainants in the above-entitled cause, by their solicitor, M. S. Gunn, and apply for the appointment of a receiver as prayed for in the bill of complaint herein, and it appearing that the property described in the trust deed or mortgage made a part of the bill of complaint is in the possession of the defendant H. H. Nelson Sheep Company, and it further appearing that the said sheep company and the defendant H. H. Nelson have consented in writing to the granting of such application, and that the said bill has been taken as confessed by the said last-named defendants; upon consideration of the said bill of complaint and the court having been fully advised in the premises—

It is now hereby ordered, adjudged, and decreed that H. B. Palmer, a suitable person, be and he is hereby appointed receiver of all and singular the said property described in said truth deed or mortgage, together with the income, issues and profits thereof.

And it is further ordered that the said defendant sheep company, its agents, officers, servants, and all other persons be and the same are hereby restrained and enjoined during the pendency of this suit from interfering with, transferring, selling, or disposing of any of said property, or from taking possession thereof, or from in any way interfering with the same or any part thereof, or from interfering in any manner with the possession or management of any of said property, or from interfering in any manner to prevent the discharge by said receiver of his duties with reference thereto.

Said receiver is hereby authorized to manage said property in such manner as will in his judgment produce the most satisfactory results, and to receive all the rents, issues and income thereof, and hold and dispose of the same subject to the order of this court.

It is further ordered that this order shall become operative upon said receiver furnishing and filing in the office of the clerk of the above-entitled court a good and sufficient bond in the penal sum of five thousand dollars, conditioned for the faithful discharge of the duties of his office as receiver, to be approved by the clerk of said court; and upon taking an oath to faithfully discharge the duties of his said office.

Dated this 3d day of September, A. D. 1904.

WM. H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Order Appointing Receiver. Filed and entered Sep. 3, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 4th day of February, A. D. 1905, a final decree was duly entered herein, which said final decree is entered of final record as follows, to wit:

[Title of Court and Cause.]

#### Decree.

This cause coming on to be heard at this term; and thereupon, on consideration thereof, it is ordered, adjuged and decreed as follows, viz:

- I. That there is due to the complainant, the American Freehold Land Mortgage Company of London, England, Limited, a corporation, for principal and interest on the indebtedness secured by the trust deed or mortgage mentioned in the bill of complaint herein, the sum of thirty-seven thousand one hundred and 50-100 dollars (\$37,100.50) and as costs four per cent of such amount, or the sum of four-teen hundred and eighty-four and 02-100 dollars (\$1484.02), as a solicitors' fee, which said item of cost is allowed as provided in and by said trust deed or mortgage, and is reasonable; and also other costs in the case, taxed at the sum of fifty-five and 45-100 (\$55.45) dollars.
- II. That unless the said sum of thirty-seven thousand one hundred dollars and fifty cents (\$37,-100.50) and costs due as aforesaid, with interest on said sum and costs, at the rate of eight per cent per annum from the date hereof, be paid within ten days

from the date hereof, that all and singular the property and premises described in said trust deed or mortgage, and hereinafter described, be sold by the officer of this court hereinafter appointed and designated to make such sale.

III. That said property be sold as an entirety, it appearing that said mortgage or trust deed provides for a sale in parcels or all together, and that the same will not probably sell for sufficient to pay and satisfy the costs and expenses of such sale, and other costs due the complainant, the American Freehold Land Mortgage Company of London, England, Limited, and the amount of the principal and interest as aforesaid, and also that the said property constitutes a single ranch or farm, and will sell to better advantage and for a better price as a whole than it would if divided and sold in parcels.

IV. That said sale be made at the front door of the courthouse in the city of Great Falls, County of Cascade, Montana, the county in which said property is situated, at public auction, after giving notice as hereinafter ordered and directed, to the highest and best bidder for cash; provided, that if the complainant, the American Freehold Land Mortgage Company of London, England, Limited, bids for said property, and its bid is accepted, it may, after paying to the officer making such sale, his compensation and commissions, as the same may be fixed and allowed by the court, and other costs and expenses in-

cident to, and incurred in, making said sale, satisfy and pay the balance of such bid by executing and delivering to said officer a proper instrument in writing, acknowledging the payment of the amount then due hereunder, to the extent of such balance, and if the said balance shall be in excess of the costs and expenses of said sale, and the amount then due the complainant, the American Freehold Land Mortgage Company of London, England, Limited, hereunder, in excess or difference shall be paid to said officer, in cash, to be disposed of as hereinafter provided.

V. The said sale shall take place between the hours of nine o'clock A. M. and five o'clock P. M. on the day designated by said officer and notice of sale, stating the time and place thereof, the authority for making the same, and containing a description of the property to be sold, signed by the officer hereinafter designated and appointed, shall be published in a newspaper of general circulation in the county of Cascade, once a week for four consecutive weeks, and the first publication shall be at least thirty days before the date fixed for said sale.

VI. That the officer making said sale shall execute, acknowledge and deliver to the purchaser a certificate, reciting that said sale was made pursuant to the authority conferred by this decree describing the property purchased by him, showing the amount paid therefor, and that such purchaser will be en-

titled to a deed of the property so purchased, on the expiration of one year from the date of said sale, unless said property shall have been duly redeemed.

VII. That if there is no redemption from such sale by a person entitled to redeem within one year from the date of said sale, the officer making the same, or in the event of his death or inability, for any reason, to act, some other officer designated and appointed by this court, shall execute, acknowledge and deliver to the purchaser, or the person then lawfully holding said certificate of sale, upon the surrender of said certificate, a deed of conveyance of said property, and the whole thereof, and thereupon the defendants H. H. Nelson Sheep Company and James T. Stanford, and all persons who may have acquired any interest in or to said property, or any part thereof from the said defendants or either of them, or any lien or encumbrance thereon, subsequent to the filing of the bill of complaint in this cause, and the issuance of the subpoena, directed to said defendants, shall stand debarred and foreclosed of and from all right, title and interest, and from all equity of redemption in and to the said premises and property, and every part thereof.

VIII. That the said officer making said sale shall apply the proceeds realized therefrom, as follows:

1. To the payment of his compensation and commission, and the other costs and expenses incurred in connection with said sale.

- 2. To the payment of the amount due the complainant the American Freehold Land Mortgage Company of London, England, Limited, as hereinbefore determined, with interest thereon from the date hereof at the rate of eight per cent per annum.
- 3. Any balance to be paid to the clerk of said court, to be held subject to the order of the court.
- (8-½). That the said officer shall report the said sale to the court within ten days from the date of making said sale, unless the time for filing said report shall be extended by the Court, which report shall be confirmed as a matter of course, unless objections to said sale are filed within twenty days after said report is presented and filed.
- IX. That Oliver T. Crane, the master in chancery of this court, be, and he is hereby, designated and appointed as the officer of this court to make said sale, and is hereby authorized and directed to exercise the powers conferred, and perform the duties imposed upon him by this court.
- X. That the receiver heretofore appointed to take possession, care for and manage said property and premises, continue to act as such receiver, with the powers heretofore granted him by this court, until the further order of this court, and that any money or funds in his possession as receiver at the time of his discharge, and after his accounts shall have been settled and allowed to be paid into the

clerk of this court, to be held subject to the order of this court.

XII. That after the application of the proceeds of such sale as hereinbefore ordered and directed, if there is any balance due the complainant the American Freehold Land Mortgage Company of London, England, Limited, a further decree be rendered against the defendants H. H. Nelson Sheep Company and H. H. Nelson for such balance, and providing that execution may issue for the collection of the same.

XII. The property and premises described in the said trust deed or mortgage, and made a part of the bill of complaint, herein, and hereby directed to be sold, are described as follows, to wit:

[Description of lands as in Bill of Complaint, omitted under stipulation of parties.]

Together with all and singular the tenements, improvements, hereditaments, appurtenances, easements, water rights, and all other rights belonging to or in any wise appertaining thereto.

XIII. The Court expressly reserves and retains jurisdiction of all matters pertaining to the said receivership, until the receiver shall be finally discharged, and also to make such amendments thereto, and such further orders and decrees as are necessary to equity and good conscience, and to fully and completely dispose of this cause.

Done in open court this 4th day of February, A. D. 1905.

# WILLIAM H. HUNT, Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and Entered Feb. 4, 1905. Geo. W. Sproule, Clerk.

And thereafter to wit, on the 24th day of October, A. D. 1904, Herbert Strain filed herein his petition pro interesse suo, which said petition is in the words and figures as follows, to wit:

[Title of Court and Cause.]

Petition of Herbert Strain pro interesse suo.

To the Honorable, the Circuit Court of the United States, In Equity Sitting Within the District of Montana, and to Its Judges:

Comes now Herbert Strain, and by this, his petition pro interesse suo, respectfully shows and humbly gives the Court to understand and be informed—

That petitioner is a citizen of the State of Montana, residing at the city of Great Falls, in the county of Cascade, Montana, and that at all the times hereinafter mentioned he was, for many years last past has been, and now is, engaged in the business of trading and buying and selling goods, wares and merchandise by wholesale and at retail under the name and style of "Strain Brothers."

That on the 17th day of August, 1904, at said county of Cascade, he purchased for full and adequate consideration, and for value, of defendant H. H. Nelson Sheep Company all the oats and oat crop then on the ranch known as the Riverdale Stock Farm, situate near Cascade, in said county, and all the hav then cut and stacked and thereafter to cut and stacked on said Farm and lands connected therewith, except such shares as might belong to one Hugh Jones and one Fred. Nicholson; that said company was then the owner of said hay and oats, and that for full consideration paid by petitioner to said company therefor said company did then and there bargain, sell, assign, transfer and set over to petitioner, and immediately deliver to him, the said hay and oats so purchased by him; that by said sale and delivery petitioner became and ever since has been the owner thereof, to wit, of eighty tons of hay and 820 bushels of oats, and that he remained in possession of the same until he was wrongfully and unlawfully dispossessed thereof as hereinafter stated, and that he paid the expenses of harvesting and putting up said hay and grain; that a true copy of the memorandum or bill of said sale is the following:

"For value received, the undersigned, H. H. Nelson Sheep Co., a corporation, does hereby sell, assign and transfer to Strain Bros., copartners, doing business in Great Falls, Cascade County, Montana, all the grain and also all the hay cut and stacked, and

hereafter to be cut and stacked, on all the hay land connected with the Riverdale Stock Farm, near Cascade, in the County of Cascade and state of Montana, being two hundred fifty (250) tons more or less, except such share hay as belonged to Hugh Jones and Fred Nicholson. All of said hay and grain are this day delivered to said Strain Bros., who will hereafter have entire charge and possession of the same. The hay already cut and stacked is to be measured in the usual way at once, and the balance is to be measured in the usual way as soon as stacked.

Dated this 17th day of August, 1904.

(Signed) H. H. NELSON SHEEP CO., By H. H. NELSON, Prest.,

President and Manager.

That petitioner had no information, knowledge or notice of the order restraining said company from selling or disposing of any of the issues or profits of said farm, until long after the said purchase by him, and that at the time he so purchased the said property and the land on which it was situate were in the actual and open possession of said company as owner, and that neither of the plaintiffs has, or ever has had, as petitioner is informed and believes, any lien or mortgage on said oats and hay, and that if there be such mortgage or lien petitioner has no notice or knowledge thereof, and it has never been of record.

That thereafter, and on or about the third day of September, 1904, and while petitioner was the owner and in possession of said chattels so purchased by him, H. B. Palmer was appointed receiver of the property of said company, and ever since has been, and now is, such receiver; that on or about the fourth day of the same month, and while petitioner was so the owner, and in possession and thereto entitled, said receiver wrongfully and unlawfully and without petitioner's consent, took from the possession of petitioner said hay and oats, to wit, 80 tons of hay of the reasonable value of \$560, and 820 bushels, or 32,800 pounds, of oats reasonably worth \$328.

Your petitioner further respectfully represents and unto the Court humbly shows, that he has repeatedly notified the said receiver of the right and title of petitioner to said chattels, and has both orally and by sworn demand required said receiver to surrender and deliver and return the said chattels to petitioner, but that the receiver has ever failed and refused to comply therewith or to surrender or return said property or any part thereof or to pay to petitioner its value or the proceeds or any thereof; that (as petitioner is informed and believes and therefore so charges) said receiver yet holds and detains and retains said property under the claim and pretense that the same is the property of said company; that if the receiver has sold or otherwise disposed of the said chattels, or any part of them, he

did so unlawfully and wrongfully, and is answerable for their value and proceeds.

That on the sixth day of October, 1904, the receiver filed in the office of the clerk of this Honorable Court a petition for leave to sell said chattels, but that said petition has not been presented.

All of which acts and doings of said receiver are, as petitioner is advised, contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your petitioner in the premises:

In tender consideration whereof, and forasmuch as your petitioner is without remedy in any other court and is relievable only in this court and cause where alone the wrong done (as well as the injury threatened) may be remedied (or prevented), your petitioner prays, that upon consideration of this, his petition, it may please the Court and your Honors to order the examination of petitioner pro interesse suo upon interrogatories to be exhibited against him by the said receiver or the plaintiff, or both, or else to order the testimony of all the witnesses produced to be taken orally by an examiner and filed, or to order the whole of the evidence to be adduced orally in open court at the hearing; and your petitioner respectfully prays, the premises considered, that the receiver be ordered and required to surrender and return to petitioner the said chattels, or, if the same shall have sold or disposed of by him, that he pay to petitioner the value thereof; that the petition of

that petitioner have judgment or order for the payment of his costs in this behalf most wrongfully sustained; and for such other and further or other and different relief as may be meet and equitable.

HERBERT STRAIN, W. T. PIGOTT,

C COPMLEY Counsel for Strain.

A. C. GORMLEY,
Great Falls, Montana,
W. T. PIGOTT,
Helena, Montana,
Solicitors for Petitioner.

State of Montana, County of Cascade,—ss.

Herbert Strain, being duly sworn, deposes, that the matters and things stated in the foregoing petition are true as he verily believes.

#### HERBERT STRAIN.

Sworn to and subscribed before me, this October 22, 1904.

[Notarial Seal]

H. R. AYER,

A Notary Public in and for the County of Cascade, Montana.

Personal service of the foregoing petition, together with a notice that it will be filed and presented to the Court at the hour of ten o'clock, A. M., on the 9th day of November, 1904, or as soon thereafter as counsel

may be heard, is hereby admitted, this October 24, 1904.

M. S. GUNN,

Solicitor and Counsel for Plaintiffs and Receiver.

[Endorsed]: Title of Court and Cause. Petition of Herbert Strain pro interesse suo. Filed Oct. 24, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 9th day of November,
A. D. 1904, an order requiring the receiver to answer the petition pro interesse suo was made and entered herein, said order being in words and figures as follows, to wit:

[Title of Court and Cause.]

Order Requiring Receiver to Answer Petition pro interesse suo.

In the Matter of the Petition of HERBERT STRAIN pro interesse suo.

Upon the filing and presentation of the petition for examination pro interesse suo of Herbert Strain,

It is hereby ordered, that H. B. Palmer, the receiver of the property and estate of the defendant H. H. Nelson Sheep Company, make, file, and serve upon counsel for said Strain, on or before the 21st day of November, 1904, his answer or response to

the said petition, showing cause, if any he have, why the prayer of said petition should not be granted.

It is further ordered that a copy of this order be served upon said Receiver or his counsel on or before the 15th day of November, 1904.

WM. H. HUNT,

Judge of said District Court.

Due service of the foregoing order is hereby admitted this November 9th, 1904.

M. S. GUNN,

Solicitor and of Counsel for Receiver.

[Endorsed]: Title of Court and Cause. Order Requiring Receiver to Answer Petition of Strain pro interesse suo. Filed and entered Nov. 9th, 1904. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 4th day of April, A. D. 1905, the master in chancery filed his report of sale herein, which said report of sale is in the words and figures following, to wit:

[Title of Court and Cause.]

Report of Sale of Master in Chancery.

To the Honorable Judges of the Circuit Court of the United States, for the District of Montana, Ninth Circuit, in Equity.

In pursuance and by virtue of a decree of the court, Honorable William H. Hunt, Judge, made in the above-entitled cause, and bearing date the fourth

(4) day of February, A. D. 1905, in and by which decree it was, among other things, considered, adjudged, ordered and decreed that all of said mortgaged property in said decree mentioned and referred to, should be sold by Oliver T. Crane, Esquire, the mastery in chancery of this court, as an entirety and as one property, and not in separate parcels, and in the manner therein directed, to satisfy the amounts due, and to become due as in said decree stated, for principal and interest upon the indebtedness secured by the trust deed or mortgage mentioned in the bill of complaint herein, and the several sums therein allowed and decreed to be paid.

I, the subscriber, as said United States master in chancery of said court, residing at the city of Helena, Lewis and Clark County, within said District and State of Montana, who was by said court so ordered to make sale of said property in said decree mentioned, set forth and described and in the manner therein directed, do respectfully certify and report.

1. That I gave notice of sale and advertised all and singular the said mortgaged property and premises in said decree and hereinafter more specifically described, mentioned, referred to and contained, at and in front of the front door of the courthouse in the city of Great Falls, Cascade County, within said District and State of Montana, on Friday, the thirty-first day of March, A. D. 1905, at the hour of eleven

o'clock forenoon of that day, as an entirety and as one property, and not in separate parcels, and upon the terms and conditions of sale as in said decree and in said advertisement in said notice of sale set forth for four weeks successively, as follows, viz.: by causing a true and correct copy of such notice to be printed once in each week—that is to say, on Monday of each and every of said four weeks successively, immediately prior to and preceding said sale, in the "Tribune," a daily newspaper published at the city of Great Falls, in Cascade County, State of Montana, within said District, and of general circulation in said Cascade County, which said notice contained a statement of the time and place of sale, the authority for making the same, and a description describing the mortgaged property and premises to be sold, signed by the subscriber, the officer designated and appointed, in said decree, to make said sale; as appears in the affidavit of J. Benn hereto attached, marked Exhibit "A."

2. That on said thirty-first day of March, A. D. 1905, the day on which the said premises were so advertised to be sold, as aforesaid, I, as said master, in person attended at the time and place fixed for said sale, and exposed said property and premises for sale, at public auction, to the highest bidder, upon the terms and conditions in said decree and in said notice stated, and according to the rules and practice of this court; and the said property and premises

were then and there by me, as such master, fairly struck off to Benjamin Graham, trustee, at and for the sum of thirty-nine thousand, three hundred and eleven dollars, and forty-eight cents (\$39,311.48), the said Benjamin Graham, trustee, being the highest, best bidder, therefor, and that being the highest, best sum bidden for the same.

- 3. That in accordance with the directions contained in said decree, I, as said master, have executed, acknowledged, and delivered to said purchaser a master's certificate of purchase of said property and premises, reciting therein that said sale was made pursuant to the authority conferred by said decree, describing the property purchased by him, showing the amount paid therefor, and that such purchaser will be entitled to a deed of the property so purchased, on the expiration of one year from the date of said sale, unless said property shall have been duly redeemed, a true and correct copy of which certificate is hereto attached, marked Exhibit "B."
- 4. That the amount realized from the sale of said premises was, in the aggregate, the sum of thirty-nine thousand three hundred and eleven dollars and forty-eight cents (\$39,311.48).

Of such aggregate sum I have credited and disbursed and retained as follows:

Allowed complainants on account of prin-

cipal amount due on decree......\$37,100.50

Allowed complainants on account of so-	
licitor's fees allowed in decree	1,484.02
Allowed complainants on account taxed	
costs allowed in decree	55.45
Allowed complainants on account interest	
at 8 per cent on above sum (from	
date of decree to date of sale)	374.51
\$33	9,014.48
Retained on account of advertising sale	.\$30.00
Retained on account of master's expenses	
to Great Falls	12.00
Retained on account of typewriting re-	
port	\$5.00
Retained on account of commissions on sale.	250.00
	\$297.00

\$39,311.48

The written acknowledgment of the receipt of the amount so credited and disbursed to complainants, duly executed by the solicitor of complainants, is hereto attached to this report marked Exhibit "C."

All of which is respectfully submitted.

Dated this fourth day of April, A. D. 1905.

#### OLIVER T. CRANE,

Master in Chancery of the Circuit Court of the United States for the District of Montana, and the officer designated and appointed to make said sale.

[Affidavit of publication of notice of sale omitted under stipulation.]

### Exhibit "B."

[Title of Court and Cause.]

### Master's Certificate of Sale.

I, Oliver T. Crane, master in chancery of the Circuit Court of the United States, District of Montana, do hereby certify that in pursuance and by virtue of a decree of this court, Honorable William H. Hunt, Judge, made in the above-entitled cause, and bearing date the fourth day of February, A. D. 1905, I duly advertised according to law and said decree the premises hereinafter described, to be sold at public vendue, to the highest, best bidder for cash, at the hour of eleven o'clock in the forenoon, on Friday, the thirty-first day of March, A. D. 1905, at the front door of the courthouse in the city of Great Falls, in Cascade County, State of Montana, within said district. That at the time and place so as aforesaid appointed for said sale, I attended to make the same, and offered and exposed said premises for sale at public vendue to the highest and best bidder for cash; whereupon, Benjamin Graham, trustee, offered and bid therefor the sum of thirty-nine thousand three hundred and eleven dollars and forty-eight cents (\$39,311.48), and that being the highest and best bid offered therefor, I accordingly struck off and sold to said bidder for said sum of money the said premises mentioned and described in said decree, which are situate in the county of Cascade, and State of Montana, and are described as follows, to wit:

[Description of lands as in Complaint and Decree omitted under Stipulation.]

Together with all and singular the tenements, improvements, hereditaments, appurtenances, easements, water rights and all other rights belonging to or in any wise appertaining thereto.

And I further certify that unless said premises shall be redeemed from said sale within one year from the date hereof, according to law, the said Benjamin Graham, trustee, his legal representatives or assigns, will, on the first day of April, A. D. 1906, be entitled to a deed of the property so purchased by said Benjamin Graham, trustee.

Witness my hand and seal this first day of April, A. D. 1905.

[Seal]

#### OLIVER T. CRANE,

Master in Chancery of the Circuit Court of the United States, in and for the District of Montana, and the officer designated and appointed by said decree to make said sale.

# Exhibit "C."

\$39,014.48. Helena, Montana, April 1, 1905.

Received from Oliver T. Crane, master in chancery of the United States Circuit Court, Ninth Circuit, District of Montana, the sum of thirty-nine thousand and fourteen dollars and forty-eight cents (\$39,014.-

48) for principal debt, interest, solicitor's fees and taxed costs under the decree in the cause entitled Benjamin Graham, Trustee, et al., Complainants, versus the H. H. Nelson Sheep Company, et al., Defendants, which said decree was rendered and entered in the United States Circuit Court for the District of Montana, on the fourth day of February, A. D. 1905.

M. S.GUNN,

Solicitor for Complainants.

[Endorsed]: Title of Court and Cause. Report of Sale of Property by O. T. Crane, Master in Chancery. Filed and entered April 4, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 12th day of June, 1905, an agreed statement of facts was filed herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Statement of Facts Agreed Upon by Herbert Strain, Petitioner, and H. B. Palmer, Receiver.

Come now Herbert Strain, petitioner, and H. B. Palmer, receiver, and hereby stipulate and agree (for the purpose of this proceeding only) upon the following as the facts upon which the petition of said Strain pro interesse suo shall be heard and determined, to wit:

- 1. Said Herbert Strain at all the times herein mentioned was, and now is, engaged in the business of trading and buying and selling goods, wares and merchandise by wholesale and at retail under the name and style of Strain Brothers.
- 2. On the 11th day of April, 1904, the complainants filed in the office of the clerk of this court their bill of complaint for the foreclosure of a certain mortgage or trust deed, a copy of which is made a part of said bill. Said bill of complaint is hereby referred to and made a part of this stipulation to the same extent and with like effect as if herein set forth in haec verba. On April 28, 1904, a writ of subpoena issued pursuant to the prayer of said bill of complaint was duly and regularly served upon the said defendants, H. H. Nelson Sheep Company and H. H. Nelson, and a decree pro confesso was entered against both said named defendants.
- 3. On April 14, 1904, the then Judge of this court made the following order in said cause:

Upon the application of the complainants in the above-entitled suit, by their solicitor, M. S. Gunn—

It is ordered that the defendant H. H. Nelson Sheep Company, its agents, officers and servants, and all other persons, be and they are hereby restrained and enjoined from selling, disposing of or transferring the possession of any of their property described in the trust deed or mortgage made a part of the bill of complaint in this suit, and recorded in the office of the county clerk and recorder of Cascade County, Montana, in Book 18 of Mortgages, page 249, until the further order of the court herein; and

It is further ordered that the defendants herein show cause before the above-entitled court in Helena, Montana, where said court is held, on the 17th day of May, 1904, at the hour of ten o'clock A. M., or as soon thereafter as a hearing can be had, why a receiver of the property described in said trust deed, and the rents, issues and profits thereof, should not be appointed as prayed for in the said bill of complaint in this suit.

Dated this 14th day of April, A. D. 1904.

(Signed) HIRAM KNOWLES,

Judge.

Said Strain had actual notice that said suit had been commenced to foreclose said trust deed or mortgage before the purchase by him of the property involved in this controversy, but had no notice or knowledge of said order above quoted or that complainants had prayed for an order enjoining the defendant company from disposing of any of the income, rents, issues or profits of the real estate described in said mortgage or trust deed until after the purchase by him hereinafter referred to unless it be held that he was charged with constructive notice of said order and the prayer of said bill by reason of the doctrine of lis pendens nor did said Strain have any actual knowledge or actual notice that said mort-

gage or deed of trust purported to cover or impose a lien upon the rents, issues, profits and proceeds of said real estate. Said order was duly served upon the defendant sheep company on April 16 and upon the defendant H. H. Nelson on May 3, 1904.

- 4. The trust deed or mortgage hereinbefore mentioned was not, and is not, accompanied by the affidavit required by sections 3849 and 3861 of the Civil Code, or any affidavit whatever; it was, on March 28, 1901, recorded in the office of the recorder of Cascade County, Montana, the county wherein all the real estate described in said mortgage is situated, in Book 18 of Mortgages, at page 249.
- 5. The defendant sheep company remained in the actual and exclusive possession, custody and control of all of said real property mortgaged from the date of the mortgage until the 4th day of September, 1904, when the receiver entered into the possession thereof; and the hay and oats in controversy were grown upon the mortgaged premises, but were never at any time delivered to, or in the possession of, the complainants or either of them, but were and remained at all times in the actual possession of the defendant company, until August 17, 1904.
- 6. On August 17, 1904, and at the time of the sale to Strain, said hay and oats had ceased to derive nutriment from the soil, were ripe, mature and ready for the harvest and a part thereof had been cut down, and all thereof was in the actual possession of the

Cefendant company; on said day defendant company was indebted to said Strain in a sum exceeding the value of said chattels, upon an express contract for the direct payment of money, to wit, upon a promise to pay Strain the price of goods, wares and merchandise, theretofore sold and delivered by him to said company, which debt was then past due and wholly unpaid, and the payment of said debt had not been, and was not at any time secured, either in whole or in part, by any mortgage, lien or pledge whatsoever. On said day and while the company was so in the possession, and while said Strain was without any knowledge, notice or information that complainants asserted any lien upon said hay and oats, unless he was charged with notice thereof by reason of the pendency of said suit and the issuance of the order hereinbefore set forth, said Strain bought of the company and the company sold to him the said hay and oats

7. Said sale was made in payment and discharge of said antecedent and existing indebtedness and was evidenced by an instrument in writing, which is set forth in and made a part of the petition of the said Strain heretofore filed in this matter. That said Strain paid for harvesting and caring for said hay and grain the sum of \$157.00; that immediately after said sale the company delivered the actual possession of said chattels to said Strain, who continually kept and maintained such possession until September 4,

1904, when said receiver, appointed on September 3d, 1904, by an order of said court, to which reference is hereby made and a copy of which is hereto attached and made a part hereof, without the consent and against the protest of said Stran took possession of said property; that said Strain, between September 5th and October 19th, 1994, repeatedly demanded of said receiver the possession of said hav and oats, and on October 19th served upon said receiver a written demand that said receiver surrender and deliver possession of said chattels to him, but that said receiver has refused to comply therewith and yet holds and retains the possession of said chattels except such part thereof as has been sold by him; that said receiver has sold 30,256 pounds of said oats at \$1.30 per hundred, or the sum of \$393.32; 51/2 tons of hay at \$9.00 per ton, \$49.50; 10 tons of straw at \$4.00 per ton, \$40.00, making the total of said sales the sum of \$482.82; that said receiver has expended for threshing \$39.70 for 310 bags and twine \$25.05, hauling oats \$28.00, for having and harvesting \$154.00, making a total of \$233.37; that the said receiver now has in his possession approximately 24 tons of said hay, and 27 tons of said grain hay and 15 tons of said straw, the value of all of said hay and straw in said receivers possession to be fixed and determined by the court or judge in the event petitioner prevails herein.

That long prior to the month of August, 1904. and on the 18th day of April, 1904, the defendants H. H. Nelson Sheep Company and H. H. Nelson consented in writing to the appointment of a receiver to take possession of, manage, operate and hold the property described in the trust deed or mortgage, made a part of said bill of complaint, during the pendency of said suit and to receive and collect the rents, issues and profits thereof and hold and dispose of the same subject to the order of said court; that Strain had no knowledge or notice of said consent or agreement; that the reason for the delay in appointing a receiver in said suit was because of the fact that the Honorable Hiram Knowles, the United States District Judge for Montana, resigned his position in office and ceased to perform any of the duties or functions of said office on the 13th day of April, 1904, and the Honorable William H. Hunt, appointed to succeed the said Knowles as District Judge, did not assume the duties of his office until the 1st day of September, 1904, and that during said interval there was no judge of said court to whom application for the appointment of a receiver could be made.

Respectfully submitted.

A. C. GORMLEY,
W. T. PIGOTT,
Solicitors for Petitioner
M. S. GUNN,
Solicitor for H. B. Palmer, Receiver.

[Endorsed]: Title of Court and Cause. Agreed Statement of Facts. Filed and entered June 12, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of February,
A. D. 1906, an order denying the petition pro
interesse suo of Herbert Strain was duly made
and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

# Order Denying Petition pro interesse suo.

This matter heretofore submitted to the Court upon petition of Herbert Strain pro interesse suo, came on regularly at this time for the judgment and decision of the court, and after due consideration, it is ordered that said petition be and the same hereby is denied.

GEO. W. SPROULE,

Clerk.

Attest a true copy of minute entry of February 26, 1906.

[Seal]

GEO. W. SPROULE,

Clerk.

By C. R. Garlow, Deputy Clerk. And thereafter, to wit, on the 21st day of April, A. D. 1906, the receiver filed his report and account herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

## Report of H. B. Palmer, Receiver.

H. B. Palmer respectfully represents and shows unto this Honorable Court:

That he was appointed receiver by an order duly made and entered in the above-entitled cause on the 3d day of September, 1904; that in compliance with the requirements of said order he furnished and filed in the office of the clerk of the above-entitled court, a good and sufficient bond in the penal sum of \$5,-000.00, conditioned for the faithful discharge of the duties of his office as receiver, which bond was approved by the clerk of said court, and took oath to faithfully discharge the duties of said office; that pursuant to the authority conferred by said order appointing him receiver as aforesaid, he did, on or about the 3d day of September, 1904, enter into the full and complete possession of the real estate described in the bill of complaint in said cause, and also took possession of the crops of hay and grain produced by said real estate and then situate thereon.

That he has received as rent for said real estate and from the sale of the hay and grain grown thereon the sum of \$1403.82, and has expended in the case, protection and management of said property and in

the payment of the taxes against the same for the years 1904 and 1905, the sum of \$1122.93; that there is attached hereto a statement of his account as receiver, showing in detail the receipts and expenditures aforesaid that M. S. Gunn has presented him with a claim for attorney's fees for services performed as his solicitor and attorney, amounting to the sum of one hundred and fifty dollars, which claim is reasonable and just; that the sum of five hundred dollars is reasonable compensation for his services as receiver; that the real estate over which he was appointed receiver as aforesaid was sold pursuant to a decree rendered and entered in the above-entitled cause on the 30th day of March, 1905, by the master in chancery of said court to one Benjamin Graham, as trustee, and a certificate of sale issued to such purchaser; that there having been no redemption of said property from said sale the said master in chancery, after the expiration of one year from the date of said sale, executed, acknowledged and delivered to said purchaser a proper deed of conveyance of said property.

Wherefore, your receiver prays that an order be made and entered fixing the time for the hearing of this report and account, directing that notice thereof be given to all parties interested for such time and in such manner as the court shall deem proper, and that upon the hearing of such report and account an order be made approving the claim presented by M.

S. Gunn and directing payment thereof, fixing the amount of your receiver's compensation in the sum of five hundred dollars, approving said account, and directing the delivery or the possession of said property to Benjamin Graham, trustee, the purchaser at said sale, and releasing the bond of your receiver and discharging the sureties thereon.

H. B. PALMER.

Receiver.

M. S. GUNN,

Solicitor for Receiver.

[Duly verified.]

Subscribed and sworn to before me this 17th day of April, 1906.

[Seal]

T. A. MAPES,

Notary Public in and for Lewis and Clark County, Montana.

# STATEMENT OF RECEIPTS AND DISBURSE-MENTS.

As shown by H. B. Palmer, Receiver of the H. H. Nelson Sheep Company from the date of his Appointment to April 12, 1906.

1904.

Sep.	7.	Insurance\$	70.25
		Trip to ranch	17.15
	15.	H. M. Jones, acct. haying	25.00
	17.	Trip to ranch	9.85
	24.	Jones, having	31.60

		29.	Trip to ranch	10.00
		30.	Eder Bros., thresh'g	6.00
(	Oct.	3.	Trip to ranch	2.05
		8.	Livery, Cascade	6.00
		12.	Trip to ranch	9.95
			Eder, threshing	15.25
			Trip to ranch	15.00
			Board 2 men 3 days	4.50
		22.	Jones, haying	34.00
			Trip to ranch	2.30
		31.	Jones, labor	17.50
]	Nov.	7.	Jones, haying	40.00
			Jones, having	40.00
			Jones, fencing	9.00
		9.	Jones, hauling oats	17.50
		7.	Trip to ranch	11.90
			Nicholson hlg. oats	19.55
		14.	Taxes	297.58
]	Dec.	10.	Store bill, Marcum	11.35
		21.	Repairing fence	13.00
		6.	Fee for bond	22.50
]	1905.			
	Jan.	5.	Trip to ranch	21.05
		10.	Livery, Cascade	5.00
		17.	Livery, Cascade	1.50
		21.	Trip to ranch	7.60
		27.	Livery, Cascade	5.00
1	Feb.	15.	Nicholson, Custodian	12.75

	H. B. Palmer et al. 71
Mar. 15.	Nicholson, Custodian 35.00
31.	Trip to ranch
	Nicholson, Custodian 35.00
Apr. 21.	Trip to ranch
25.	Livery, Cascade 6.00
May 1.	Trip to ranch 10.15
3.	Nicholson, Custodian 25.55
11.	Insurance 70.25
Jul. 26.	Trip to ranch 12.15
Aug. 15.	Trip to ranch 13.40
Oct. 24.	Premium on bond 11.25
Nov. 14.	Trip to ranch 8.65
Dec. 8.	Livery, Cascade 3.00
1906.	
Mar. 31.	Insurance
	Balance
	<del>\$1,403.82</del>
1904.	
Oct. 14.	Marcum lease\$ 65.00
24.	Sale of oats 393.34
	Jones lease
Nov. 7.	Nicholson lease 100.00
	Sale of hay 19.55
Dec. 3.	Nicholson lease
15.	Nicholson lease 20.00
1905.	
Feb. 25.	Nicholson lease
May 6.	Marcum lease 65.00

June	20.	Rent pasture	84.00
Oct.	2.	Rent, Kerr	150.00
	12.	Rent, pasture	3.50
Nov.	16.	Rent pasture	10.00
		Rent pasture	10.00
1906.			
Jan.	4.	Lease, acct. rent	36.60
	13.	Marcum, rent	65.00
	30.	Sale of hay	83.20
Feb.	26.	Lease, balance rent	10.30
Mar.	17.	Sale of hay	40.00
	31.	Sale of hay	90.00

\$1,403.82

[Endorsed]: Title of Court and Cause. Report and Account. Filed April 21, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 5th day of May, A. D. 1906, the objections of Herbert Strain to the receiver's report were filed herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

# Objections of Herbert Strain to Receiver's Report.

Comes now Herbert Strain and makes and files herein the following objections to the report and account of the Receiver H. B. Palmer, to wit:

The said Herbert Strain objects to the allowance and approval of the said receiver's report and account as presented and asks that the court, in its order passing upon said report and account, require and direct the said receiver to deliver to the undersigned certain personal property, which the said receiver took into his possession on the 4th day of September, 1904, to wit, eighty (80) tons of hay of the reasonable value of \$560.00, and eight hundred and twenty (820) bushels or thirty-two thousand eight hundred (32,800) pounds of oats at the reasonable value of \$328.00, or in the event that said receiver has disposed of any of said hay and oats that he pay to the undersigned the value thereof with interest from said 4th day of September, 1904.

These objections are based upon the fact, as shown in the said receiver's report, that at the sale of the said real estate, in pursuance of the decree of this court, the complainants herein purchased all of said real estate for a sum sufficient to cover their mortgage indebtedness, interest and costs, so that the said mortgage thereby became satisfied in full without recourse to the said hay and oats, which had theretofore, to wit, on the 17th day of August, 1904, been purchased by the undersigned, as fully appears from his petition and the agreed statement of facts on file herein.

Respectfully submitted,
HERBERT STRAIN.

W. T. PIGOTT,
A. C. GORMLEY,
Counsel for said Herbert Strain.

[Endorsed]: Title of Court and Cause. Objections of Herbert Strain to Receiver's Report. Filed May 5, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 28th day of May, Λ. D. 1906, an order approving receiver's account, overruling objections thereto, etc., was duly made and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

# Order Approving Receiver's Account and Overruling Objections Thereto, etc.

The report and account of H. B. Palmer, receiver, having come on regularly for hearing, and the court having duly considered the same and the objections thereto, it is ordered:

- 1. That such objections be and the same are hereby overruled.
- 2. That said account be and the same is hereby approved and allowed as correct.
- 3. That the compensation of said receiver be and the same is hereby fixed at the sum of five hundred dollars.
- 4. That the claim of M. S. Gunn, as solicitor and counsel for said receiver for services performed, amounting to the sum of \$150.00, be and the same is hereby approved, and the receiver is authorized and directed to pay the same.

- 5. That the balance of the money remaining in the hands of the receiver, after payment of the claim of his solicitor and counsel, be applied on the compensation hereby allowed said receiver.
- 6. That the receiver deliver possession of the real estate purchased by Benjamin Graham, trustee, at the sale thereof, pursuant to the decree rendered and entered in the above-entitled cause, to the said Benjamin Graham, trustee.

Done in open court this 28th day of May, 1906.

WILLIAM H. HUNT,

Judge.

[Endorsed]: Title of Court and Cause. Order Approving Receiver's Account, Overruling Objections Thereto, etc. Filed and entered May 28th, 1906. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 31st day of May, A. D. 1906, an order amending said order of May 28, 1906, and denying the petition of Herbert Strain and dismissing his proceeding, was duly made and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Order Amending Order of May 28, 1906, etc.

It is ordered that the order made in this cause May 28, 1906, be amended as follows:

"It is further ordered, adjudged and decreed that the petition pro interesse suo of Herbert Strain in this suit be, and is hereby denied and refused, and that the proceeding by way of said petition be, and is hereby finally dismissed."

This amendment to said order being entered nunc pro tune as of May 28, 1906.

GEO. W. SPROULE,

Clerk.

Attest a true copy of minute entry of May 31, 1906.
[Seal] GEO, W. SPROULE,

Clerk.

By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1906, petition for allowance of appeal and order granting same and fixing bond were filed and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

Petition for Allowance of Appeal and Order Granting Same.

Herbert Strain, the above-named petitioner pro interesse suo, conceiving himself aggrieved by the order and decree made and entered in the cause above entitled on May 28, 1906, as amended or supplemented by the order and decree made and entered May 31, 1906, nune pro tune as of May 28, 1906, in said cause, whereby it was ordered, adjudged and decreed, among other things, that the objections to the report and account of the receiver be overruled, that the account be approved and allowed as corrected, that the claim of M. S. Gunn, as solicitor and counsel for the receiver, amounting to \$150, was approved and the receiver authorized and directed to pay the same, that the balance of the money remaining in the hands of the receiver be applied on the compensation allowed to him, and that the petition pro interesse suo of Herbert Strain be, and was thereby, denied and refused, and that the proceeding by way of said petition be, and was thereby, finally dismissed, does hereby petition for an order allowing him, the said Herbert Strain, petitioner pro interesse suo, to prosecute an appeal from said order and decree so entered on May 28, 1906, to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons set out in the assignment of errors herewith filed herein, and does hereby appeal from said final order and decree; and he prays that this appeal may be allowed, and that a transcript of the record and proceedings upon which said order and decree was made, duly authenticated, may be sent to said Circuit Court of

Appeals for the Ninth Circuit, and also that an order may be made fixing the amount of security which the said petitioner shall give upon such appeal.

HERBERT STRAIN,

Petitioner pro interesse suo and Appellant.

By A. C. GORMLEY and W. T. PIGOTT,

His Solicitors.

W. T. PIGOTT, Of Counsel.

# Order Allowing Appeal and Fixing Amount of Bond.

The foregoing petition is granted, and the appeal prayed for allowed upon said petitioner giving a bond in the sum of two hundred and fifty dollars. It is ordered that a certified transcript of the record, proceedings and papers upon which the final order and decree of May 28, 1906, was rendered, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

CHAS. E. WOLVERTON,
Judge.

[Endorsed]: Title of Court and Cause. Petition for Allowance of Appeal, and Order Allowing Appeal and Fixing Amount of Bond Thereon. Filed Aug. 7, 1906, Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 7th day of August, A. D. 1906, Herbert Strain filed his assignment of errors herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

## Assignment of Errors.

Now comes Herbert Strain, petitioner pro interesse suo in the above-entitled cause, by his solicitors, and says that in the order and decree in said cause entered on May 28, 1906, as amended by the order and decree of May 31, 1906, entered nunc pro tunc as of said May 28, 1906, and in the record and proceedings therein, there is manifest error, and he files the following assignment of errors committed or happening in said cause and upon which he will rely on his apepal from said order and decree:

- 1. The Court erred in its order of February 26, 1906, in overruling the petition pro interesse suo, in this, that the petition should have been granted.
- 2. The said order of February 26, 1906, was and is erroneous in that, upon the agreed statement of facts, the petition should have been granted and allowed.
- 3. The Court erred in overruling, on May 28, 1906, the objections of petitioner to the report and account of the receiver, for the reason that said objections should have been sustained.
- 4. The Court erred in overruling the objections to said report and account of said receiver, in this: It

was made to appear, by the record in said cause, that upon the sale of the real estate mortgaged, in pursuance of the decree of foreclosure, that the complainants purchased said real estate for a sum sufficient to cover their mortgage indebtedness, interest and costs, so that the said mortgage and decree entered thereon became and was satisfied in full without recourse to the hay and oats which had theretofore, on August 17, 1904, been purchased by said petitioner, or to the proceeds of said hay and oats, or any proceeds of any of said hay and oats, or either.

- 5. The Court erred in said order of May 28, 1906, in approving and allowing, and in approving or allowing, said report and account of said receiver, because under the petition pro interesse suo, the agreed statement of facts filed July 12, 1905, and the proceedings and record in said cause, the said report and account should have been disapproved and disallowed upon consideration of the objections aforesaid thereto, filed May 5, 1906.
- 6. The Court erred in overruling said objections so filed on May 5, 1906, to said report and account of said receiver, because the real property mortgaged and sold under the decree dated February 4, 1905, was bid in by complainant, Benjamin Graham, trustee, at and for the sum of \$39,311.48, and said sale to him was thereafter confirmed and in all things approved, and said purchase price paid; and the oats

and hay taken and seized by said receiver, if ever subject to the lien or charge of said mortgage, was thereby released and said lien or charge extinguished, and said hay and oats, or their proceeds in the hands of the receiver, belong to and should have been ordered, delivered to petitioner, who purchased and took possession thereof on August 17, 1904, and continued to be the owner and entitled to possession of the same.

- 7. The Court erred in making that part of its said order of May 28, 1906, directing that the balance remaining in the hands of the receiver, after payment of the claim of his solicitor and counsel, be applied on the compensation allowed to said receiver, for the reason that such balance consisted, and consists, of said hay and oats (or the proceeds thereof) then and now owned by petitioner, who in good faith purchased and took immediate possession of the same on August 17, 1904.
- 8. The Court erred in that part of said order and decree of May 28, 1906, which part of said order and decree was made May 31, 1906, and directed to be entered nunc pro tunc as of May 28, 1906, as follows:

"It is ordered that the order made in this cause May 28, 1906, be amended as follows: It is further ordered, adjudged and decreed that the petition pro interesse suo of Herbert Strain in this suit be, and is hereby, denied and refused, and that the proceeding

by way of said petition be, and is hereby, finally dismissed."

#### Because:

- (a) Upon the admitted facts shown by the record and proceedings said petition should have been granted.
- (b) The crops of hay and oats purchased by petitioner from defendant H. H. Nelson Sheep Company on August 17, 1904, were chattels and not real property.
- (c) Said hay and oats so purchased by said Strain were not covered by or subject to the lien or mortgage made to complainants on March 20, 1901.
- (d) The service of the subpoena upon defendants in the suit to foreclose said mortgage of March 20, 1901, was not constructive notice of a lis pendens, because the doctrine of constructive notice by the service of subpoena has no application to suits involving such personal property as is the subject of ordinary commerce.
- (e) Petitioner was not chargeable with constructive notice by service of the subpoena upon the defendants, for the reason that Section 634 of the Code of Civil Procedure of Montana prescribes the only method whereby constructive notice of suit may be given, and such statute applies as a rule of property; there cannot be notice by lis pendens except upon compliance with the statute.

- (f) The land only was mortgaged. The land is in the nature of a pledge. The issues and profits of the land were not pledged, but belonged to the mortgagor in possession and to its assigns. In this case the mortgagor was actually in possession and control at the time when petitioner purchased the hay and oats from it. Even where the issues and profits of land are specially pledged as security, the mortgagee is not entitled to them unless and until he, or a receiver, takes actual possession. There cannot be a pledge without possession.
- (g) The crops for 1904 could not be mortgaged in 1901.
- (h) If in March, 1901, when said mortgage was made, the crops of 1904 could have been mortgaged, the only instrument by which they could have been mortgaged was a chattel mortgage executed and authenticated as required by sections 3849-3861 of the Civil Code of Montana. It is expressly stated in the record that no chattel mortgage was ever made.
- (i) Petitioner was a purchaser of the hay and oats, in good faith, and for value.
- (j) Petitioner purchased, in good faith and for value, the oats and hay, and took actual possession thereof, on August 17, 1904; and while he was so the owner and in actual possession, the Court below, on September 3, 1904, appointed said receiver, and said receiver thereafter, and while petitioner was so the owner and in possession of said chattels, wrongfully

and unlawfully took them from petitioner's possession, and refused to surrender the same, or any part thereof, to petitioner.

(k) The said mortgage of March 20, 1901, did not, and does not purport to, embrace any crops thereafter to be planted or grown on the real estate embraced in the mortgage. The provision in the mortgage that "if the grantor fails to pay any or either of said notes at maturity, or for thirty days thereafter, then all of said debt shall, at the option of the trustee, become due and collectible, and all rents and profits of said property shall then immediately accrue to the benefit of said party of the third part, and the occupants of said property shall pay rent to the trustee," did not, and could not, cover crops without a potential existence, nor does the said mortgage even attempt to create a lien thereon. Under the provision aforesaid defendant sheep company was obligated to pay rent from the time the option was exercised, and the provision did not require the mortgagor to pay rent for the use of the premises and at the same time surrender the crops which he had cultivated and raised. Nor was the option exercised.

Wherefore said petitioner pro interesse suo prays that said order and decree of May 28, 1906, as the same was amended or supplemented by the order and decree of May 31, 1906 (entered nune pro tune as of May 28, 1906), be reversed, set aside, and for naught

held, and that said Circuit Court be directed by this Court to grant said petition pro interesse suo.

A. C. GORMLEY and W. T. PIGOTT,

Solicitors for Herbert Strain, Petitioner and Appellant.

W. T. PIGOTT, Counsel.

[Endorsed]: Title of Court and Cause. Assignment of Errors on Strain's Appeal to the Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 7, 1906. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

And thereafter, to wit, on the 8th day of August, A. D. 1906, Herbert Strain filed his bond on appeal herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

## Bond on Appeal.

Know all men by these presents, that we, Herbert Strain, as principal, and Earle Strain and H. R. Ayer, as sureties, of the County of Cascade, State of Montana, are held and firmly bound unto H. B. Palmer, receiver, and to the above-named complainants and defendants jointly and severally in the sum of two hundred and fifty dollars (\$250.00) to be

paid to them, or any of them, for the payment of which well and truly to be made we bind ourselves jointly and severally firmly by these presents. Sealed with our seals and dated the 8th day of August, 1906.

Whereas, the said Herbert Strain has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the final order and decree made and entered in the above-entitled cause on the 28th day of May, 1906, as the same is amended by an order dated May 31, 1906, entered nunc protune as of May 28, 1906, by the Circuit Court of the United States for the District of Montana:

Now, therefore, the condition of this obligation is such that if the above-named Herbert Strain shall prosecute his appeal to effect and answer all costs if he fail to make his said plea good, then this obligation to be void, but otherwise to remain in full force and virtue.

HERBERT STRAIN. [Seal]
EARLE STRAIN. [Seal]
H. R. AYER. [Seal]

The foregoing bond is approved by me.

CHAS. E. WOLVERTON,

United States District Judge, sitting in the Circuit Court of the United States for the District of Montana. State of Montana, Cascade County,—ss.

Earle Strain and H. R. Ayer, being severally sworn, each for himself deposes that he is one of the sureties named in the foregoing bond, and that he is worth five hundred dollars over and above his just debts and liabilities and property exempt from execution, and that he is a resident and freeholder within the State of Montana.

EARLE STRAIN. H. R. AYER.

Sworn to before me, this August 6th, 1906.

[Notarial Seal]

A. R. METTLER,

Notary Public in and for Cascade County, Montana.

[Endorsed]: Title of Court and Cause. Bond on Appeal and Approval Thereof. Filed and Entered Aug. 8, 1906. Geo. W. Sproule, Clerk.

#### Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to H. B. Palmer, Receiver; Benjamin Graham, Trustee; The American Freehold Land Mortgage Company, of London, England, Limited; H. H. Nelson Sheep Company; H. H. Nelson, and James T. Stanford:

You are hereby notified, that in a certain suit in equity in the United States Circuit Court, Ninth Circut, in and for the District of Montana, wherein said Benjamin Graham, trustee, and the said The American Freehold Land Mortgage Company of London, England, Limited, were and are complainants, and said H. H. Nelson Sheep Company, H. H. Nelson, and James T. Stanford were and are defendants, and said H. B. Palmer was receiver, and Herbert Strain was and is petitioner pro interesse suo, an appeal has been allowed said petitioner therein to the United States Circuit Court of Appeals for the Ninth Circuit, from the final order and decree made and entered in said cause in said Circuit Court for the District of Montana on May 28, 1906, overruling the objections to the account and report of said receiver and approving and allowing the same as correct, approving the claim of the receiver's solicitor and directing payment of said claim, ordering the receiver to apply the balance of the moneys remaining in his hands on the receiver's compensation, and denying the petition pro interesse suo of said Strain, and finally dismissing the proceeding by way of said petition as said final order and decree was amended or supplemented by the order and decree of May 31, 1906, entered nune pro tune as of said May 28. You are hereby cited and admonished to be and appear in said Circuit Court of Appeals in San Francisco, California, within thirty days after the date of this citation, to show cause, if any there be, why the said order and final decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Honorable CHARLES E. WOLVER-TON, Judge of the United States District Court for the District of Oregon, sitting and presiding in said Circuit Court for the District of Montana under designation and appointment as prescribed by law, and discharging all the judicial duties of the Honorable William H. Hunt, as Judge of said District Court for the District of Montana and as Judge presiding in the said Circuit Court of and for the District of Montana, this eighth day of August, A. D. 1906.

CHAS. E. WOLVERTON,

United States District Judge presiding.

[Seal] Attest: GEO. W. SPROULE,

Clerk.

Service of the foregoing citation, and receipt of a copy thereof, admitted this August 9, 1906.

M. S. GUNN,

Solicitor for H. B. Palmer, Receiver, and for the Complainants named in said Citation.

JAMES T. STANFORD.
H. H. NELSON SHEEP CO.
By H. H. NELSON, Prest.
H. H. NELSON.

[Endorsed]: No. 705. Benj. Graham, Trustee, et al., vs. H. H. Nelson Sheep Co., et al. H. B. Palmer, Receiver; Herbert Strain, Petitioner p. i. suo. Citation on Appeal, and Admission of Service Thereof. Filed and entered Aug. 2, 1906. Geo. W. Sproule, Clerk.

#### Clerk's Certificate to Transcript.

United States of America, District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 93 pages, numbered consecutively from 1 to 93, is a true and correct transcript of the pleadings, process, decree, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession, as requested by attorneys for appellant in accordance with a praecipe for transcript filed herein; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of thirty-nine and sixty one-hundredths dollars (\$39.60), and have been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court for the District of Montana, at Helena, Montana, this 31st day of August, A. D. 1906.

[Seal]

GEO. W. SPROULE,

Clerk.

[Endorsed]: No. 1371. United States Circuit Court of Appeals for the Ninth Circuit. Herbert Strain, Appellant, vs. H. B. Palmer, Receiver, Benjamin Graham, Trustee, The American Freehold Land Mortgage Company of London, England, Limited, H. H. Nelson Sheep Company, H. H. Nelson and James T. Stanford, Appellees. Transcript of Record. Upon Appeal from the United States Circuit Court for the District of Montana.

Filed September 7, 1906.

F. D. MONCKTON,

Clerk.

By Meredith Sawyer, Deputy Clerk.

